TABLE OF CONTENTS

PAGE

POINT ONE.—Respondent's argument is based in reality on the postulate that the shipment clause in this letter of credit called for a DIRECT VOYAGE of the steamer or steamers from Java to Philadelphia. The shipment clause did not so provide 1

POINT TWO.—The rules of law appertaining to cost, insurance and freight contracts, point of shipment to point of destination, cannot be used to sustain the respondent's argument; nor can cases where some plain provision of the purchase and sales contract was violated, be cited in support of the judgments below 16

POINT THREE.—Respondent's contention that the documents were insufficient because the railroad bill of lading described the goods as "Java Sugar" instead of "Java White Sugar" (although the invoice presented so described them) is unsound and is not available to the respondent upon this appeal 25

POINT FOUR.—Respondent's argument in support of the refusal of the District Court to introduce evidence of custom and usage as to the meaning of the shipment provision in this letter of credit is unsound 27

POINT FIVE.—The decisions and judgments of the United States Circuit Court of Appeals, Fourth Circuit, in the case at bar, should be reversed and the case remanded to the District Court of the United States for the Eastern District of Virginia for further proceedings in accordance with the opinion of this Court 29

ALPHABETICAL LIST OF CASES CITED IN THE PETITIONERS' REPLY BRIEF.

PAGE

Bank of Italy *v.* Merchants National Bank, 236 N. Y. 106 26
Bank of Taiwan *v.* Union National Bank of Philadelphia, 1 Fed. (2d) 65 27
Border National Bank *v.* American National Bank, 282 Fed. 73, 80 26
Bowes *v.* Shand, 2 L. R. App. Cases 455 (1877) 23, 28
Bradlee & McIntosh Co. *v.* Frey & Son, 280 Fed. 375... 28

California Prune & Apricot Growers, Inc. *v.* Baird & Peters, 1926 Can. Supreme Court 208 22
Cohens *v.* Virginia, 6 Wheat. 265 17
Crane *v.* Bennett, 177 N. Y. 106 17

Filley *v.* Pope, 115 U. S. 213 (1885) 23
Firemen's Insurance Co. *v.* Lawrence, 14 Johnson 46 (1816) 19, 24

Hansson *v.* Hamel and Horley, Ltd. (1922), 2 App. Cases 36 24
Harrison *v.* Fortlage, 161 U. S. 57 28
Hostetter *v.* Park, 137 U. S. 30 28

Iasigi *v.* Rosenstein, 141 N. Y. 414 (1894) 19, 28
International Banking Corp. *v.* Irving National Bank, 274 Fed. 122, affirmed 283 Fed. 103 27

Jones *v.* Schneider, 22 Minn. 279 (1875) 22

Lamborn *v.* Lake Shore Banking & Trust Company, 231 N. Y. 616 25
Lamborn *v.* National Park Bank, 240 N. Y. 520 27
Landauer & Company *v.* Craven & Speeding Bros. (1912), 2 K. B. D. 94 24
Laudisi *v.* American Exchange National Bank, 239 N. Y. 234 26
Law *v.* Cross, 66 U. S. 533 28
Ledon *v.* Havemeyer, 121 N. Y. 179 (1890) 18
Lowber *v.* Bangs, 2 Wall. 728 (1864) 23, 24

PAGE

Maes & Co., Inc. *v.* Grace & Co., 239 N. Y. 519 28

Matthew Smith Tea, Coffee & Grocery Co. *v.* Lamborn, and two other cases, 276 Fed. 325; affd. 10 Fed. (2d) 697; Certiorari denied 271 U. S. 683, 685, 686 .....7, 15

Norrington *v.* Wright, 115 U. S. 188 (1885) 23

O'Meara *v.* National Park Bank, 239 N. Y. 386 .....26, 27

Railway Co. *v.* McCarthy, 96 U. S. 258 27

Ruttonjee *v.* Frame, 205 App. Div. 354; affd. 237 N. Y. 115 28

Vietor *v.* National City Bank, 200 App. Div. 557 28

H. O. Wilbur Sons & Company *v.* Lamborn, 276 Pa. 479 7

Woodruff *v.* Noyes, 15 Conn. 335 (1843) 20

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, *et al.*, etc.,

Plaintiffs-Petitioners,

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA,

Defendant-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Fourth Circuit, by Order Allowing the Certiorari, filed February 28, 1927.

REPLY BRIEF IN BEHALF OF PLAINTIFFS-PETITIONERS.

POINT ONE.

Respondent's argument is based in reality on the postulate that the shipment clause in this letter of credit called for a DIRECT VOYAGE of the steamer or steamers from Java to Philadelphia. The shipment clause did not so provide.

The simple facts of this case are that Lamborn & Company's vendors shipped the sugar for Southgate & Company and others, on a Japanese steamship, the *Chifuku*

Maru in September, 1920, and received ocean bills of lading covering transportation from Cheribon and Samarang, two ports in Java, to Philadelphia (Plaintiffs' Exhibits 1 to 7, Rec., pp. 113-114). When the *Chifuku Maru* became disabled, approaching Port Said, and it was known to the plaintiffs that she would be detained there, having another steamer the *West Cheswald* which carried the same kind of sugar, shipped in the same month in 1920 from Java, then moving toward New York, plaintiffs sent the *West Cheswald* into Philadelphia to make delivery of sugar under contracts (with Southgate and others) requiring delivery f. o. b. railroad cars that port.

It is perfectly true that in so doing plaintiffs desired to make delivery of the sugar before the expiration of certain letters of credit—for instance this letter of credit expired January 31st, 1921 (the *Chifuku Maru* arrived at Philadelphia on February 4th, 1921; Rec., p. 127)—but in thus protecting their own rights it cannot be said that they were not also serving the best interests of their customers in making a more prompt delivery in a falling market.

Thus in a sense the *West Cheswald* and her cargo was a reserve or reservoir of these goods available in the very emergency which happened. She carried the same goods, laden on board, *i. e.*, shipped at Java, in the month of September, 1920, *and she carried these sugars straight from Java to Philadelphia.* Hence coincident with her being ordered to Philadelphia, there was sent to Southgate & Company the letter dated December 13th, 1920 (Plain-

tiffs' Exhibit 52, p. 122) the final declaration of steamers in this case as follows:

"December 13, 1920.

Messrs. T. S. Southgate & Company,
Norfolk, Virginia.

Dear Sirs:

CONTRACT APRIL 23, 1920, 1000 BAGS, 10% MORE OR LESS

On November 10, 1920, we advised you that the Steamer *Chifuku Maru*, previously declared to carry sugars against the above contract, which was expected to arrive in Philadelphia the last half of November, 1920, had been unavoidably delayed, owing to accident to her machinery, making it necessary to stop at Port Said, and at this writing we have received no definite information as to the sailing date from that port.

In consideration of the above mentioned circumstances, we hereby declare the steamer *West Cheswald*, carrying the same quality of sugar, and having made the same shipment from Java, in fulfillment of your contract, which steamer is expected to arrive in Philadelphia this week.

Very truly yours,

LT LAMBORN & COMPANY"

Now, the shipping clause in the letter of credit read thus and not otherwise (Rec., p. 107):

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

And the question is wherein did this resourceful and prompt delivery of the goods, from a steamer which had come direct from Java to Philadelphia, constitute any breach of the said shipping clause?

In the minds of the plaintiffs, those acts constituted a conscientious performance of their contract. It is of record, indelible and unequivocal, in what respects the Norfolk Bank claimed that those acts did *not* constitute performance—we mean claimed *at the time* when it refused to pay and while the letter of credit was still open. We refer to Plaintiffs' Exhibit 230 dated January 22nd, 1921 (pp. 151-152, Rec.). It is a letter bearing every evidence on its face of preparation with aid of counsel, a letter divided into four numbered paragraphs and accompanied by specifications and details of the charges of a broken contract.

Nothing could be more circumstantial or be more convincing evidence against the Norfolk Bank than this document and the papers attached thereto. Therefore, we turn to it and invite the Court to regard it as conclusive proof of the exact claims of breach made by the Norfolk Bank on its refusal to honor the letter of credit in this case.

The said alleged breaches are contained in Paragraphs numbered "(3)" and "(4)" of that letter. The first alleged breach was that we had made successive declarations of steamers, described in specification "(3)" as

> "five different shifting sets of declarations of shipments of this product."

The other ground, set out in specification "(4)" of said document, was stated to be

> "unmistakable government evidence * * * that shipment was not effected until eighteen days after date stipulated in fourth condition of credit letter" (*i. e.*, the shipment clause we are discussing).

We shall have to go back to a telegram from the defendant Norfolk Bank to the Bankers Trust Company

dated December 27th, 1920 (Plaintiffs' Exhibit 36, p. 143) to find out what the bank meant by this statement of "government evidence of shipment" eighteen days late. There we find it:

> "that ship on which loaded *sailed* from Samarang October *eight* calling at Mascassar then Borneo and finally back to Samarang from whence *sailed for New York October seventeenth.*" (Italics ours.)

In short a confusion by the Bank at Norfolk between *shipment, i. e.,* loading on board, and *sailing* or *clearance* from Java or Javan port.

Such was the basis for refusal, upon which the respondent bank stood while this letter of credit was pending, and while the defendant was being urged to honor it by its New York representative, Bankers Trust Company.

This Court will observe that there is nothing in those stated grounds concerning a direct voyage; there is nothing concerning any alleged insurance right of the purchaser; there is nothing challenging the fact that the merchandise placed free on board railroad cars at Philadelphia was Java White Sugar.

Once more let us regard the words of the shipment clause in this letter of credit (Rec., p. 107):

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

Not a word about clearance or sailing from Java; not a word about the nature of the voyage from Java to Philadelphia; nothing to indicate whether the voyage was to be eastward through the Pacific Ocean and Panama Canal, or around Cape Horn, or whether it was to be westward through the Indian Ocean and the Suez Canal, or around the extreme southern tip of Africa and thence across the

Atlantic Ocean; not a word about the time within which the ship must arrive at Philadelphia or within which the sugar was to be delivered to the purchaser by loading free on board railroad cars at that port; not a word about declaration of steamer or steamers in favor of the bank.

Hence, it was true that in respect to the grounds thus specified in detail by the respondent bank each ground was untenable and was an objection in regard to an alleged matter as to which the language and contents of the letter of credit were silent.

It remained to invent new grounds for the purpose of this litigation. Therefore, in the face of the document from which we have quoted, there was introduced on the first trial oral testimony by an officer of the respondent bank, interrogated by its counsel, to this effect (Rec., p. 65):

> "Q. Why did you decline to pay it(this letter of credit)? A. You want me to elaborate?
>
> "Q. Tell your reason in full to the jury. A. *We had information that the ship on which the sugar was tendered had been cleared from a port in Java to Port Said with option of New York, and at the last moment a diversion had been made in the ocean for Philadelphia.* We understood our terms of the credit were that the shipment was to be from Java to Philadelphia, and *that was our reason for not paying.*" (Italics ours.)

Then may we not ask why, when on January 22nd, 1921, the respondent bank stated in writing and in detail with accompanying documents the reasons why it would not pay its letter of credit, it did not state what Mr. Wharton, the cashier, swore was its reason when he took the stand in 1924? We submit the answer must be because the reason given by the witness in 1924, and then and since urged upon the Courts, was evolved after the Bank had stated its reasons for refusing to pay in January, 1921.

And let it be noted, with the Court's permission, that even then—as late as this testimony of Mr. Wharton in 1924—among the assigned reasons for refusing to honor its letter of credit is not to be found the claim that the sugar was not Java White Sugar.

The contention concerning substitution of steamers under these Lamborn contracts has been laid at rest.

> *H. O. Wilbur Sons & Company* v. *Lamborn*, 276 Pa. 479;
>
> *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn*, and two other cases, 270 Fed. 325; affd. 10 Fed. (2d) 697; Certiorari denied 271 U. S. 683, 685, 686.

There never was anything in it and as the bank's letter of credit in this case contained no provision for declaration of steamers, it was absurd to add that stated ground for dishonoring this letter of credit.

Again, it became known to the bank at Norfolk that a contract for shipment from Java by steamer or steamers to Philadelphia did not cover the clearance or departure of the ship from Javan port or ports; that "shipment" in that sense meant loading on board. Hence the second alleged ground of refusal that because the *West Cheswald* did not *clear* from the last Javan port until October 17th, 1920, therefore shipment was not effected in September, in turn had to be abandoned.

What was left? Nothing but the invention of the alleged necessity of a *direct voyage* of the S. S. *West Cheswald* from Java to Philadelphia. Such was the one ground, *the theory of a direct voyage*, stated under oath by Mr. Wharton in 1924, and such is the real intent of the argument of the respondent at the bar of this Court.

It is interesting to observe that in Mr. Wharton's testi-

mony quoted on our opponent's brief at page 72 the words "direct voyage" are omitted. A paraphrase is used:

> "We understood our terms of the credit were that the shipment was to be *from Java to Philadelphia,* and that was our reason for not paying." (Italics ours.)

And in the brief of our learned opponent there is the same marked omission to use the words *"direct voyage,"* and the paraphrases adopted are: "a continuous intention" (p. 31), "a continuous shipment from Java to Philadelphia" (p. 31), and again "a continuous intention from the inception of the voyage to send the vessel to Philadelphia" (p. 31).

If counsel means a direct voyage, we beg leave to ask why he does not say so in plain English? Or is this case to be determined upon an alleged intention, *when as a matter of fact the S. S. "West Cheswald" did make a direct voyage from Java to Philadelphia?* For there is nothing in this letter of credit specifying a direct voyage or any other kind of a voyage *either westward or eastward,* while in respect to Philadelphia the Island of Java lies in the middle of the world in either direction.

The respondent insists upon a *direct voyage* from Java to Philadelphia. But as the letter of credit did not specify such voyage, the claim is camouflaged and resolves itself into an argument of original intent. We refer to page 31 of respondent's brief, where, after quoting the following statement made by District Judge GRONER on the first trial:

> "I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia"

counsel says:

> "Why not?

> "This position can be completely answered in the language of the Supreme Court by saying that the buyer takes the risk of delivery or sea perils which may occur in the course of a voyage from Java to Philadelphia, but does not take the risk of delivery or disaster which may occur in the course of a voyage from Java to Port Said, and, upon the exercise of the option of the sellers, from Port Said to New York, and, by diversion from the latter voyage shortly before docking, to Philadelphia."

Passing by the fact that this argument is based on some alleged right of the buyer and not of the bank, it is one of the most perfect examples of *petitio principii* imaginable. What risk did this buyer run in respect to this sugar until it was delivered to him at Philadelphia? It was not his sugar until then. If the buyer could have insured its profits on its contract with Lamborn & Company, we point out and have demonstrated in our main brief, that insurance of profits under a contract of purchase and sale is a totally different *res* from insurance of goods afloat belonging to another man.

But what risk on a voyage from Java to Philadelphia is increased by a voyage from Java to Port Said, Port Said to New York and New York to Philadelphia? It is exactly like saying that a journey to Washington from New York is increased by the risk of the train stopping at Trenton, Philadelphia and Baltimore! *The places named in the argument are on the road to Philadelphia, and ports of call on the shortest route to that port from the ports of loading of this sugar in Java.*

If the foregoing quotation does not mean that the contention of the respondent in this case is that this ship must have made a direct voyage from the port of Samarang, Java, to Philadelphia, pursuing her solitary way through the ocean, stopping nowhere for mail, sup-

plies or bunkers, sailing without interruption the whole ten thousand miles up to the dock at Philadelphia, what does it mean?

But with the buyer, Southgate & Company, we made no such undertaking for a direct voyage. The shipment clause in the contract with Southgate & Company is word for word like the shipment clause in the letter of credit as amended. So that if this shipment clause in the letter of credit contains and implies no covenant for a direct voyage from Samarang, Java, to Philadelphia, it is vain to invoke the shipment clause in the contract with the buyer because it is literally the same as the contract clause of the letter of credit.

However, the learned counsel for the respondent does not quite come to the point of claiming a direct voyage in so many words. He means it, but not finding it in the letter of credit he dare not claim it. Hence the claim is disguised under nebulous expressions. We quote from page 31 of the respondent's brief:

> "And in further answer to the same suggestion that the requirement does not contemplate *a continuous intention and a continuous shipment from Java to Philadelphia*, in the language of the Supreme Court it can be said that the requirement of shipment from Java to Philadelphia 'defines an act to be done by the sellers at the outset and a condition precedent to any liability of the buyer.'" (Italics ours.)

Here we have the basic idea of a direct voyage disguised under the phrase "continuous intention," and the more nearly approaching phrase "continuous shipment from Java to Philadelphia." Again we find the same language in the next paragraph (p. 31 of Respondent's Brief):

> "The uncertainty and confusion resulting from

> the conclusion that the contract did not require *a continuous intention from the inception of the voyage to send the vessel to Philadelphia* is well illustrated in this case." (Italics ours.)

Respondent's counsel then proceeds to recite the evidence by which the *West Cheswald*, when off the Jersey shore, was instructed to go into Philadelphia instead of into New York. And to conclude his contention on this, the very root of his argument, he recites the clause from the shipment clause of the letter of credit in italics as follows (p. 34):

> "during the months of August-September from Java to Philadelphia"

Misquoting it, we submit, because it reads (Rec., p. 107):

> "Shipment: Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

When an argument must thus be put forward in disguise, and when to illustrate its point the crucial clause of the letter of credit must thus be modified, a certain lack of substance in the argument is demonstrated on its face.

But our learned opponent's argument seems to require something more than a paraphrase of the shipment clause. Apparently it has compelled counsel for the respondent to put back again into the letter of credit the clause which the parties by mutual consent eliminated therefrom, to wit:

> "and copy of Ocean Bill of Lading covering shipment Java to Philadelphia."

Of course it is out of the document and hence out of the case; but we do not attach any undue importance to that fact. The purchaser had not required exhibition of

the ocean bill of lading (see Contract, Rec., p. 112). It is quite obvious that the purpose of the elided clause was to supply proof of loading on board so that shipment within the stipulated months would thus be *prima facie* established.

As a matter of fact, plaintiffs made this proof by affidavit of Mr. Keen (Plaintiffs' Exhibit 21, Rec., pp. 136-137), and it is noteworthy that at the time of presenting their documents to the Bankers Trust Company, Lamborn & Company submitted to the Trust Company *a copy of the said ocean bill of lading* although they were under no possible obligation so to do (Rec., pp. 141, 156).

The fair conclusion from these facts is, we submit, that the form of words thus stricken from the letter of credit were intended and understood by both the Bank and the plaintiffs to be some sort of evidence of shipment, as to which fact other evidence was made and accepted for the sake of convenience.

Be this as it may, there being no evidence or testimony as to the motives or reasons for the excision of that clause from the letter of credit, it may be that no conclusion as to the reasons therefor would be drawn by the Court. In either event it is impossible, we submit, for counsel for the respondent to use the stricken out clause as a foundation for any part of his argument in this case.

It is extremely pertinent, we believe, for us to point out that before the defendant Bank formulated in circumstantial detail its stated grounds for refusing to honor the letter of credit (Plaintiffs' Exhibit 230, pp. 151-152), the Bank had as much knowledge as the plaintiffs had concerning the voyage of the *West Cheswald*. It stated that knowledge on December 27th, 1920, in its telegram to the Bankers Trust Company (Plaintiffs' Exhibit 36, page 143) wherein the Norfolk Bank said:

> "we have convincing evidence that sugars tendered by Lamborn were not shipped from Java until October seventeenth maritime records show that ship on which loaded sailed from Samarang October eight, calling at Mascassar then Borneo and finally back to Samarang from whence sailed for New York October seventeenth *further that this ship was diverted to Philadelphia though originally intended for New York*"

So the Bank knew all about the voyage of the *West Cheswald* as early as December 27th, 1920. Knowing it, it did not claim that the shipment covered by this letter of credit was required to be from Java to Philadelphia. It did not claim that the fact that the *West Cheswald* sailed from New York and was diverted to Philadelphia, was one of its grounds for refusing to pay its letter of credit. It never claimed either of those things until it came to file its so-called "Supplemental Statement of Grounds of Defense" on October 23, 1923.

For the same telegram of December 27th, 1920, continues from where we last left off as follows:

> "our credit specifically calls for shipment from Java August or September and Lamborn's *failure to comply with this important requirement compels us to refuse payment* moreover our client has shown us letters indicating their sugars loaded on steamer *Chifuku Maru* which has never arrived." (Italics ours.)

This telegram is not difficult to construe or obscure in meaning. It states very plainly

> "our credit specifically calls for *shipment from Java* August or September and Lamborn's failure to comply with this important requirement compels us to refuse payment." (Italics ours.)

Then is added the subject-matter of the previous declaration of the *Chifuku Maru*. Hence the telegram is the

forerunner of the formal statement of grounds of refusal to pay dated January 22nd, 1921; and both papers state the same grounds.

The point we are making is that they both state the same grounds, but that neither of the grounds stated sets forth that the diversion of the *West Cheswald* from New York to Philadelphia was a ground for refusal to pay, or that the ocean bill of lading of this sugar on board the *West Cheswald* not showing transportation to be direct from Java to Philadelphia, was ground for the refusal to pay, *although the respondent was well aware of both circumstances when it formulated its grounds for refusing to pay.*

Let us remember that these were Lamborn's sugars while on the high seas. They were Lamborn's sugars until unloaded and until weighed, until duty was paid upon them, and until they were placed f. o. b. railroad cars consigned as written. Let us remember that Lamborn & Company had the right to bring them to Philadelphia by one or more steamers. Let us remember that the bank had no risk at all in the movement of the goods. Let us remember that the buyer had no risk at all in the movement of the goods. Its liability to pay arose only and when this sugar was placed free on board railroad cars in the port of Philadelphia. Let us remember that as a matter of fact, in good faith, without delay, these sugars were shipped on board a steamer in Java and taken—carried direct—to Philadelphia. With those facts in mind we submit to the Court that the argument of the respondent does not deal with facts but with theories. It belongs not to the domain of commercial law, but to the metaphysics of theology.

And we respectfully beg to submit that in view of that undoubted fact, the reason why every Court in the United

States, except the Court below herein, has rejected the same argument as that now made by the respondent at this bar, is obvious; and this Court refused by writ of certiorari to review the contrary decisions rendered by the United States Circuit Court of Appeals, Second Circuit:

> *Matthew Smith Tea, Coffee & Grocery Co.* v. *Lamborn*, and two other cases, 276 Fed. 325; aff'd 10 Fed. (2d) 697; Certiorari denied, 271 U. S. 683, 685, 686.

At the time those certioraris were denied by this Court, this conflict between the decision of the Fourth Circuit in the case at bar and the decision of the United States Circuit Court of Appeals, Second Circuit, and all the other decisions in the State and Federal Courts, existed.

The decision of the Circuit Court of Appeals, Fourth Circuit, would invalidate every shipment f. o. b. named destination and named place of shipment, where the seller, honestly intended to fulfill his contract and having the means to do so, used goods of the same kind, shipped at the same time, shipped from the same place, on the road and route to the place of destination, used them to perform his contract when the original shipment destined for the particular buyer was lost in transit or delayed by accident.

To illustrate what we mean: Assume that a potato grower in Aroostook County, Maine, agreed to ship by rail from Weeksboro to Portland, and deliver there f. o. b. cars a freight car of potatoes. Assume that the shipment was to be made in the first week of October; that in that same week he had also made a shipment of another car of potatoes to his warehouse in Augusta, which car stood on a siding in that city. Assume that the freight car

loaded with the potatoes for the buyer at Portland was derailed and its contents destroyed. The rule invoked by the respondent in this case would make it impossible for the shipper in Weeksboro to wire to Augusta to hitch the carload of potatoes waiting on a siding there to the next through freight train and carry it to Portland to make delivery, *because forsooth as to that particular carload in reserve he had not had the original intention to send it to Portland.* In short, that an accident or casualty would *compel* the seller to break his contract, although at the very moment he had it in his power to perform it.

So that if Lamborn & Company could not make delivery from the *Chifuku Maru,* they would break the contract, and if they tried to use the sugar on the *West Cheswald* they would also break the contract; hence owing to the casualty to the *Chifuku Maru* the law would *compel* them to break the contract.

To that result indubitably the argument of the respondent in this case arrives.

POINT TWO.

The rules of law appertaining to cost, insurance and freight contracts, point of shipment to point of destination, can not be used to sustain the respondent's argument; nor can cases where some plain provision of the purchase and sales contract was violated, be cited in support of the judgments below.

Respondent's brief is given an air of great respectability, even of authority, by profuse quotations from the writings and discourse of eminent judges in rendering decisions in certain cases. But this Court has been careful to point out that the authority of a decision depends

not upon the statements by way of argument or otherwise of the writer of the opinion, but by the facts of the case before the Court and the decision rendered upon such facts. Thus as early as the case of *Cohens* v. *Virginia*, 6 Wheat. 265, at page 399, Chief Justice MARSHALL laid down the rule as follows, referring to certain dicta of the Court in the case of *Marbury* v. *Madison*:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

A similar announcement is found in the Court of Appeals of the State of New York in *Leroy B. Crane* v. *James Gordon Bennett*, 177 N. Y. 106, where Judge MARTIN stated at page 112:

> "As was said by the learned writer of that opinion in *Colonial City Traction Co.* v. *Kingston City R. R. Co.* (154 N. Y. 493, 495): 'It was not our intention to decide any case but the one before us, * * * and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made, by way of argument or otherwise, than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the

> court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance.' (*Stokes* v. *Stokes*, 155 N. Y. 581, 594; *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 551.) It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different."

With these principles in mind we proceed to set forth the basic facts and the actual decision in the several cases cited in respondent's brief.

Ledon v. *Havemeyer*, 121 N. Y. 179 (1890).

Here was a contract c. & f. Cuba. The buyers were to provide marine insurance. The contract did not specify either the place of shipment or the place of delivery; but the Court said:

> "It is implied by this language, and the surrounding circumstances, that the shipment was to be made in Cuba, upon a vessel bound for New York."

In other words, because it was a c. & f. contract, and because the buyers were to provide marine insurance, it was to be implied that the vessel should be bound for New York.

The question involved in the case was whether, in view of the provision of the contract requiring "shipment within thirty days" the vessel was to *clear* within such period. That was the only ground of objection made by the buyer at the time, and the real point argued before or considered by the Court.

Iasigi v. *Rosenstein*, 141 N. Y. 414 (1894).

In this case the contract required "shipment from Turkey." All the Court held was that the seller should not have his complaint dismissed because he showed that the goods had been transshipped at London, and that he was entitled to introduce evidence that such transshipment was customary and indeed necessary in order to get the goods from Turkey to New York.

Firemen's Insurance Co. v. *Lawrence*, 14 Johnson 46 (1816).

This was an action by a ship owner to recover for the loss of a vessel insured by the defendant insurance company. Defendant claimed that at the time the loss occurred the vessel was engaged upon a different voyage from that for which she was insured. It appeared that those in charge of the vessel had formed an intention to go to a different port from the one named in the insurance policy; but while she was on the high seas, and before such diversion had been carried into effect by entering upon a changed course, the loss occurred.

There was judgment below in favor of the insured against the insurance company.

Upon appeal the Chancellor wrote a long opinion appearing between pages 54 and 62, in which he reached the conclusion that the judgment of the Supreme Court should be reversed. It is from this opinion that respond-

ent's counsel has quoted. Seven senators concurred with the Chancellor.

But Senator Barker thought the judgment should be affirmed because there had been a mere intention to deviate and no actual deviation of the voyage. Fourteen senators concurred with him, with the result that by a vote of fifteen to eight the judgment of the Supreme Court in favor of the insured and against the insurance company was affirmed.

Not only has the respondent's counsel, therefore, argued upon the dissenting opinion in the case, but also this decision is a strong authority in support of our contention that a vessel's voyage is determined not by the course which is intended to be taken but by the one which it actually takes, and squarely supports Mr. Justice WAGNER and the Supreme Court of Pennsylvania, and the other cases cited by us in our main brief.

Woodruff v. *Noyes*, 15 Conn. 335 (1843).

In this case the goods were shipped pursuant to a contract of purchase which contained the direction

"Please ship to the care of F. W. Bushnell"

This person apparently resided or did business in Norwich, Connecticut. The purchaser, Chollar, resided or did business in Brooklyn, Connecticut. We quote from the report: "On the 27th of November, 1839, the plaintiffs shipped the castings so ordered, by a vessel bound to Norwich, then at Hartford; this being the usual mode of transportation. They were directed to Justus Chollar, Brooklyn; but not to the care of F. W. Bushnell, Norwich; and bills of lading were given accordingly. The castings arrived at Norwich, on the 28th of November, and were immediately taken, by one Perry, without the knowledge of Bushnell, and carried to the railroad depot, to be trans-

ported in the usual way of conveying goods from Norwich to Brooklyn, and were duly entered for that purpose." The report goes on to say that while the castings were lying there (apparently meaning Norwich), the purchaser became insolvent, and various creditors attached the goods as goods of the purchaser, Chollar. The plaintiffs, against these creditors, claimed that they had the right to stop the goods *in transitu* as they had never been delivered to Chollar. The question of fact left to the jury was whether Perry, the truckman, had been authorized by Chollar to receive the goods and transport them, or cause them to be transported, to Brooklyn; or as stated by the learned Court:

> "The only question of fact, therefore, controverted between the parties, as to this part of the case, was, whether Chollar authorized Perry to act merely as a truckman, or common carrier, to transport the property from the place where it was landed; or whether he conferred upon him, in addition to this, a general authority to take charge of all the goods which should be sent to him at Norwich, which would, of course, include the property in question. This question of fact was distinctly submitted to the jury, with instructions, that if Perry was Chollar's general agent to take charge of all the goods sent to him, he might accept them; but if he was employed merely as a truckman, or common carrier, he would have no authority to waive any objection which Chollar might make because they were not sent as directed."

The jury found for the plaintiff, and the judgment entered on the verdict was affirmed.

Here then was a case where because the goods had not been sent as directed by the contract, title did not pass from the seller unless the purchaser waived the omission

to conform to the contract. The jury held that he had not so waived.

Jones v. *Schneider*, 22 Minn. 279 (1875).

Here the contract contained specific provisions as to the manner of transportation:

> "You will please ship to me from the factory to Bass Lake station, care of J. H. Lohman, on or before the 1st day of July, 1874, one of the Marsh harvesters, for which I agree to pay you or your agent, in cash and notes, on the arrival of the machine," etc.

The report of the case states: "At the time when the order was given, plaintiff's agent agreed to sell and ship the harvester in accordance with the terms of the order. Plaintiffs shipped a lot of harvesters from the factory to Minneapolis, without selecting any particular one for defendant, and on June 26, 1874, shipped one of the lot from Minneapolis to Bass Lake station, where it arrived as early as some time in July, 1874, *but there is no evidence tending to show that defendant was ever made aware of the arrival of the harvester at the station mentioned, or that it was ever delivered to him.*" (Italics ours.)

The action was one for *goods sold and delivered*; but the Court held that this did not constitute a delivery; hence that the suit could not be maintained. That situation is entirely foreign to the one presented here.

> *California Prune and Apricot Growers, Inc.* v. *Baird & Peters*, 1926 Canada Supreme Court 208.

In this case it should be noted that the seller was to make delivery of the prunes "f. o. b. Pacific Coast rail shipping point," and that they were shipped from Red

Bluff, California, but on the Canadian Pacific Railway instead of over the Canadian National Railways. Here, therefore, the goods were to become the goods of the purchaser on being loaded on board railroad cars at Pacific Coast shipping point. The purchaser had the right, therefore, to stipulate upon what line and by what route his goods should be carried to him. He was vested with the right of insurance in the goods from the moment they were placed f. o. b. railway cars California. They were his goods. Thus the contract specified in detail the particular kind of bill of lading which the seller was obliged to take out. The seller took out a different bill of lading over a different route. In an action by the seller to recover the purchase price it was very naturally held that there had never been a delivery and that the seller could not recover.

Filley v. *Pope*, 115 U. S. 213 (1885);
Norrington v. *Wright*, 115 U. S. 188 (1885).

Respondent has placed its chief reliance upon these two cases. Neither of them is applicable to the situation at bar; but since we have discussed them fully in our main brief we think it is unnecessary to say anything further here.

Bowes v. *Shand*, 2 Appeal Cases 455 (1877).

The only question argued or discussed was whether the sellers had performed their contract when it was shown that they had loaded substantially all of the rice on board prior to the commencement of the contract period.

Lowber v. *Bangs*, 2 Wall. 728 (1864).

The stipulation in the charter party here was very different from that in the Lamborn contract. It said:

"The ship to proceed from Melbourne to Calcutta with all possible dispatch."

It was conceded by both parties that the vessel had not proceeded from Melbourne to Calcutta with all possible dispatch, and it was shown that on the contrary she had gone from Melbourne to Manila and thence to Calcutta, arriving some three months later than she should have done. The question in the case was whether the quoted provision was a representation or a warranty, and the Court held that it was the latter.

Hansson v. *Hamel and Horley, Ltd.* (1922), 2 App. Cas. 36.

Again this was a c. i. f. contract from Norway to Kobe or Yokohama. The goods were transshipped at Hamburg. The bill of lading tendered was that of the second carrier, but the bill of lading of the initial carrier was never tendered. In other words, the bill of lading covered only a part of the voyage.

Landauer & Company v. *Craven & Speeding Bros.* (1912), 2 K. B. D. 94.

This was a c. i. f. contract, from the Philippine Islands to London. The bill of lading tendered was from Hongkong to London.

Thus it will be seen that in every one of these cases (except *Lowber* v. *Bangs* and *Firemen's Insurance Co.* v. *Lawrence*), the contract was one under which property in the goods was to pass to the buyer at the point of shipment or that the particular kind of contract of carriage which the seller was to procure was specified in detail. The question raised in one form or another was simply whether or not the seller had taken out the contract of carriage required.

POINT THREE.

Respondent's contention that the documents were insufficient because the railroad bill of lading described the goods as "Java Sugar" instead of "Java White Sugar" (although the invoice presented so described them) is unsound and is not available to the respondent upon this appeal.

At the foot of page 5 of respondent's brief it is argued that Lamborn & Company's papers presented to the Bankers Trust Company were insufficient because the only document which termed the goods "Java White Sugar" was the invoice prepared by Lamborn & Company. The argument is developed by the respondent between pages 60 and 64.

This contention was raised for the first time in the defendant's answer or supplemental statement of grounds of defense as amended on October 23rd, 1923, and was argued upon the first appeal. It was not argued upon the second appeal, nor did the Circuit Court of Appeals, Fourth Circuit, advert to the claim in either of its two opinions.

We submit that the purpose of this argument is to attempt to bring this case within the decision of the Court of Appeals in *Lamborn* v. *Lake Shore Banking & Trust Company*, 231 N. Y. 616, a case wherein the New York courts granted the motion of the Lake Shore Banking & Trust Company to vacate an attachment sued out by Lamborn & Company in New York State.

But the decision has no application. In the first place the letter of credit there provided that it should be

> "available by your drafts at sight against bills of lading for 550 bags Java White Granulated Sugar"

while here there is no provision in the letter of credit

susceptible of a construction requiring the railway bill of lading to describe the goods as Java White Sugar.

In the second place, in a later case, *Bank of Italy* v. *Merchants National Bank*, 236 N. Y. 106, the New York Court of Appeals qualified the rule previously laid down in the *Lake Shore Banking & Trust Company* case, and expressly exempted from such rule four classes of cases as follows:

> 1. If the words used in the guaranty and in the bill of lading were as a matter of common knowledge synonymous.
>
> 2. If the guaranty covered a certain class of objects and the bill was for one species of that class.
>
> 3. If the course of dealing between the parties had been such that they might be held as a matter of law to have affixed their own meaning to the terms employed.
>
> 4. If the dispute as to the identity of the terms was not substantial.

In the third place the question of Lamborn & Company's right to recover against the Lake Shore Banking & Trust Company, and its successor, is now pending undetermined before the United States Circuit Court of Appeals, Sixth Circuit.

Moreover, it is settled law that a description of the goods need not be contained in any particular document or documents; it is enough if the complete description of the goods can be spelled out from all the documents presented to the bank by whomsoever prepared:

> *Laudisi* v. *American Exchange National Bank*, 239 N. Y. 234;
>
> *Border National Bank* v. *American National Bank*, 282 Fed. 73, 80;
>
> *O'Meara* v. *National Park Bank*, 239 N. Y. 386.

But the point is not now available to the respondent because the bank did not base its refusal to pay on this ground. It is estopped now to assert the objection.

Railway Co. v. *McCarthy*, 96 U. S. 258;
International Banking Corp. v. *Irving National Bank*, 274 Fed. 122, affirmed 283 Fed. 103;
Bank of Taiwan v. *Union National Bank of Philadelphia*, 1 Fed. (2d) 65;
O'Meara Co. v. *National Park Bank, supra;*
Lamborn v. *National Park Bank*, 240 N. Y. 520.

POINT FOUR.

Respondent's argument in support of the refusal of the District Court to introduce evidence of custom and usage as to the meaning of the shipment provision in this letter of credit is unsound.

We had not intended to argue the error of the District Court in refusing to permit us to amend our notice of motion for judgment and to introduce evidence of custom and usage; but since the respondent has devoted some eight pages of his brief to the argument (Brief, pp. 64-71) we beg leave to comment on it briefly:

The respondent's argument is summed up in its brief at page 68 as follows:

> "The Circuit Court of Appeals had decided in this case what the parties meant by the language they used, and it followed that it was not permissible to vary the same by the claim of an existing usage or custom to the contrary."

But the case is now in the United States Supreme Court. It is not decisive here what the Circuit Court of Appeals decided the parties meant. The decision of that Court is not binding on this Court. The case is in the same position as if it at the very outset before the first trial

we had attempted to allege and offered to prove this custom and usage which we claim exists, but the allegations of our pleading had been stricken out and our evidence rejected.

It was error to refuse to permit us to make the amendment and to reject our evidence as to the meaning in the trade of the disputed expression of the contract and letter of credit.

See the following cases where evidence of custom and usage was received (or held to have been erroneously excluded) as to the meaning and construction of phrases relating to the shipment, transportation or delivery of merchandise.

Hostetter v. *Park*, 137 U. S. 30: "to be delivered without delay."

Bradlee & McIntosh Co. v. *Frey & Son*, 280 Fed. 375: "Shipment: From source during April and May, expected to arrive in New York June and July."

Vietor v. *National City Bank*, 200 App. Div. 557: "shipment."

Maes & Co., Inc. v. *Grace & Co.*, 239 N. Y. 519: "ex ship."

Law v. *Cross*, 66 U. S. 533: "afloat."

Ruttonjee v. *Frame*, 205 App. Div. 354 affirmed 237 N. Y. 115: "afloat."

Iasigi v. *Rosenstein*, 141 N. Y. 414: "March steamer shipment from Turkey * * * goods to be taken from dock on arrival of steamer."

Harrison v. *Fortlage*, 161 U. S. 57: "ex ship."

Bowes v. *Shand*, 2 L. R. App. Cases 455: "to be shipped at Madras or coast, for this port, during the months of March and/or April."

POINT FIVE.

The decisions and judgments of the United States Circuit Court of Appeals, Fourth Circuit, in the case at bar, should be reversed and the case remanded to the District Court of the United States for the Eastern District of Virginia for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

LOUIS O. VAN DOREN,
EDWARD R. BAIRD, JR.,
H. G. CONNOR, JR.,
EDWARD S. BENTLEY,
Of Counsel for Plaintiffs-Petitioners.

7864